No. 20641

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA AND BAKER AIRCRAFT SALES, INC.,

Appellants and Cross-Appellees,

v.

BETTY K. FURUMIZO, ET AL.,

Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR THE UNITED STATES OF AMERICA

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I N D E X

CITATIONS

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JURISDICTIONAL STATEMENT

This action was brought by Betty K. Furumizo, on her own alf and on behalf of Cynthia H. Furumizo, a minor, and as administratrix of the estate of Robert T. Furumizo, against United States of America, under the Federal Tort Claims Act, U.S.C. 1346(b), 2671, et seq. and against Baker Aircraft Sales, ., under 28 U.S.C. 1332, seeking to recover damages for the th of her husband in the amount of $350,000. The district court, er trial on the merits, entered judgment for the plaintiffs in amount of $221,580.39. Defendants' timely motions for a new

trial were denied on October 1, 1965. On November 26, 1965, th United States filed a notice of appeal and three days later Bak Aircraft Sales, Inc. filed its notice of appeal. That same day November 29, 1965, plaintiffs filed a notice of cross-appeal. jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

On June 19, 1961, plaintiffs' decedent, a student pilot, a Charles I. Shima, a flying instructor employed by defendant Bak Aircraft Sales, Inc. (hereinafter Baker), took off from Honolul International Airport in a single-engine Piper Super Cub owned Baker (Tr. 81, 84, R. 376).[1/] The purpose of the flight was to provide decedent with instructions concerning touch-and-go land (Tr. 377). In this maneuver, the pilot "performs an approach and a landing [on a runway] and then, without stopping his land roll, proceeds directly into [a] takeoff" (Tr. 1264).

During the ensuing half-hour, the Piper made a number of touch-and-go landings at the Honolulu field on runways 4 right 4 left (Tr. 102, 978, R. 377). These runways are each 7000 fee in length and extend in a southwest-northeast direction, parall

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1/ "Tr." references are to the transcript of proceedings filed in this Court; "R." references are to the reproduced transcript of record, exclusive of the trial transcript; and "PX" references are to plaintiff's exhibits while "GX" referenc are to the Government's exhibits.

each other (PX-1).[2] Each runway intersects the main
t-west runway (number 8) at a 45 degree angle (PX-1).
way 8 is 13,104 feet in length (PX-1).

While the Piper was in the process of making a touch-and-
landing, it received the following transmission from the
olulu control tower: PIPER NINE NINE ZULU MAKE THIS A
L STOP HOLD SHORT OF EIGHT IF POSSIBLE (PX-5 transmission
9, Tr. 964).[3] The Piper acknowledged the communication and
pped on runway 4 left, near the midfield taxi-strip,
roximately 900 feet before the intersection of runways 4 left
8 (Tr. 229, PX-1). The local control operator in the tower[4]
n cleared an Air Force T-33 trainer for take-off from runway 8
-5 trans. #25, Tr. 94, 966). After the T-33 cleared the runway
local control operator told a Japan Air Lines DC-8 to taxi in
ition and hold at the end of runway 8 (Tr. 966). Baker's

We were advised by the Clerk of the Court in a letter dated
ruary 16, 1966, that the exhibits admitted into evidence by the
er court would not be reproduced but would be considered in their
ginal form.

The Piper's identification number was N-3299Z (R. 377). The
er communicated with the aircraft by calling "NINE NINE ZULU"
ch are the last three numbers and letters in the Piper's
ntification number (PX-5).

In addition to the local control operator, Mr. Humphreys, there
e three other controllers on duty in the tower at the time of
accident: the flight data operator, Mr. Krogh; the ground
trol operator, Mr. Cappellas; and the tower supervisor, Mr.
cia (Tr. 923-924).

aircraft then received the following instruction from the tower: PIPER NINE NINE ZULU PULL AHEAD SLIGHTLY [TO] ALLOW DC THREE TO PASS BEHIND YOU (PX-5, trans. #28, Tr. 967). Thereafter, the DC-8 was advised by the tower that the wind was from the north-northeast at 6 knots and that it was cleared for take-off (PX-5 trans. #30, Tr. 968-969). At that time, there were scattered clouds at 3000 feet and visibility was 15 miles (R. 377).

After making eight more transmissions to other aircraft in the area, the local controller cleared a Cessna 150, which was located on runway 4 left just north of the intersection of that runway and runway 8, for takeoff from 4 left (Tr. 973-974). Then an Air Force C-47, which was holding at the end of runway 4 right, received the following transmission from the tower: AIR FORCE SIX THREE THREE EIGHT CAUTION TURBULENCE DEPARTING D C EIGHT CLEARED FOR TAKE-OFF (PX-5 trans. #43, Tr. 317, 974). After issuing the warning and take-off clearance to the C-47, the controller stated: "PIPER NINE NINE ZULU CAUTION TURBULENCE DEPARTING DC-8 CLEARED FOR TAKE-OFF" (PX-5 trans. # 44, Tr. 974).

The Piper aircraft, notwithstanding the turbulence warning it has just received, began its take-off roll immediately (Tr. 234 1077). At that moment, the DC-8 was approximately two miles beyon the intersection of runways 4 left and 8 (Tr. 1069, 1077, PX-1).

5/ While the transmission might be construed as a warning alone (the turbulence created by the DC-8 which had been cleared for take off, it was in fact a warning coupled with a clearance to the Pip

e Piper completed its take-off roll and initial climbout rmally,but then began to climb "excessively nose high".(Tr.). At an altitude of about 50 to 75 feet, the Piper "appeared stall," its right wing fell off to the right and the plane ntacted the ground just short of the intersection of runways left and 8 (Tr. 95, 101). It was 6:56 p.m. local time, twenty nutes before sunset (R. 377).

The C-47 which had been cleared for take-off prior to the per, delayed its take-off some twenty to forty seconds, because e pilot wanted to wait for the turbulence generated by the DC-8 subside (Tr. 317-318). It then began its take-off roll along nway 4 right. As the C-47 passed the intersection of runways right and 8, at an altitude of approximately 150 feet,the lots saw the Piper on the ground burning (Tr. 321). The C-47 perienced moderate turbulence and continued on its flight r. 321).

Plaintiffs instituted this action against the United States d Baker Aircraft Sales, Inc. claiming damages in the amount of 50,000 (R. 13-15). Plaintiffs' theory of recovery was that per took-off "directly into the 'jet wash' of a DC-8, which d previously taken off . . . thereby causing the [light] rcraft to crash" (R. 373). Plaintiffs alleged that the United ates, through its employees, was negligent in failing to provide equate safeguards for the protection of decedent from the hazards

f wake turbulence and in clearing the Piper for take-off directly nto the wake turbulence of the DC-8 (R. 373). They also alleged nat Baker Aircraft, through its employees Shima, was negligent in aking-off or allowing decedent to take-off directly into the jet ash of the DC-8 in spite of Shima's knowledge, as well as the warn iven, of the hazard involved. The Government denied plaintiffs' llegations and asserted that any damages to the plaintiffs was aused by the negligence of the instructor pilot employed by aker (R. 27-28, 465).[6/]

After a lengthy trial, the district court (per Tavares, J.) ntered judgment for the plaintiffs (R. 614). The court found, nter alia, that "the cause of the accident was turbulence caused y the departing DC-8" (R. 557); that defendant "Baker was negligen n not having furnished an instructor who was so fully aware of uch dangers that he would have avoided taking off when and under he circumstances he did" (R. 559); and that the negligence of aker was "a contributing cause" of the accident (R. 560). The ourt also found that the Government controllers "had a duty to xercise judgment to attempt to avoid danger where such danger as or should have been obviously imminent under the circumstances

/ Baker denied that any of its employees were negligent and ontended that the damages were proximately caused by the egligence of the decedent (R. 375). In addition, Baker asserted cross-claim against the Government contending that if it were eld liable to the plaintiffs, it should have judgment against the nited States for such amount or for contribution (R. 375).

. 561); and that here, they should have "attempted to hold the clearance a sufficient time to minimize the acute nger" to the Piper (R. 562). The court concluded that each fendant "should pay one half" of the $221,580.39 judgment . 562).[7/] Thereafter, both defendants filed timely motions for new trial which were denied by the district court on October 1, 65 (R. 694).

SPECIFICATIONS OF ERROR

1. The district court erred in failing to find that the gligence of Baker's flying instructor was the sole proximate use of the accident involved herein.

2. The district court erred in finding the air traffic ntrollers negligent in the performance of their duties.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Tort Claims Act d the Civil Air Regulations are set forth in the appendix to is brief.

SUMMARY OF ARGUMENT

The record before this Court makes plain that the negligence Baker's flying instructor superseded any alleged negligence the part of the controllers and, additionally, that the instructor gligence was the sole proximate cause of Mr. Furumizo's death.

7/ The district court's opinion is reported at 245 F. Supp. 981.

hus, the judgment entered against the United States must be eversed. Moreover, wholly independent of any question as to the orrectness of the district court's causation finding, the judgment ust be reversed for the additional reason that the court erred n finding that the air traffic controllers were in any way egligent in the performance of their duties on the afternoon of une 19, 1961. The evidence in this case clearly establishes hat the tower personnel fully and properly performed all the uties and responsibilities required of them at the time of the ccident.

ARGUMENT

I. SCOPE OF REVIEW AND APPLICABLE PRINCIPLES OF LAW

A. Scope of review

This Court is, of course, justified in holding a trial court's inding of fact "clearly erroneous" under Rule 52(a) if, after eviewing all the evidence, it is left with a firm impression hat error has been committed. Guzman v Pichirilo, 369 U.S. 98; United States v. United States Gypsum, supra; Dresser Industr . Smith-Blair, Inc., 322 F. 2d 878, 881 (C.A. 9); Scott Publishin o. v. Columbia Basin Publishers, Inc., 293 F. 2d 15, 20 (C.A. 9), ertiorari denied, 368 U.S. 940.

And, quite apart from evidentiary matters, where findings of act are induced by erroneous interpretations of the law, they re not binding on the reviewing court. Baumgartner v. United Sta

2 U.S. 665, 670-671; Island Service Co. v. Perez, 309 F. 2d
9, 804 (C.A. 9); United States v. Miller, 303 F. 2d 703,
9-710 (C.A. 9), certiorari denied, 371 U.S. 955; Davis v.
rkhill-Goodloe Co., 302 F. 2d 489, 491 (C.A. 5). Such findings
nnot stand. Ibid.

B. General rules of tort law applicable to this case

The findings and conclusions of the district court must also considered in light of the general principles of negligence applicable to aviation. In the absence of special statutes ordinary rules of tort law apply to aircraft accidents. United ates v. Miller, 303 F. 2d 703 (C.A. 9), certiorari denied, 371 S. 955; see also Franklin v. United States, 342 F. 2d 581, 584 A. 7), certiorari denied, 382 U.S. 844; United States v. ultetus, 277 F. 2d 322 (C.A. 5), certiorari denied, 364 U.S. 828. nce the accident in this case occurred in Hawaii, the substantive ndard of negligence derives from the law of that State. 28 U.S.C. 6(b); Richards v. United States, 369 U.S. 1; Franklin v. United ates, supra.

Under Hawaii law, as in all common-law jurisdictions, it is omatic that the essential elements of a cause of action in ligence are (a) the existence of a duty on the part of the fendant, (b) the negligent failure to perform that duty and (c) injury resulting directly from that failure. Medeiros v. Honomu gar Co., 21 Haw. 155, 159; see Carreira v. Territory of Hawaii,

0 Haw. 513, 518-519. Thus, before a defendant can be found to be egligent, it must first be determined that he owed some duty o the plaintiff. See Young v. Price, 47 Haw. 309, 314; Ciacci v. oolley, 33 Haw. 247, 252-253. For, where there is no duty owed y the defendant, there can be no negligence on his part. Cf. Wax . City and County of Honolulu, 34 Haw. 256, 257.

In addition, liability will not attach unless the plaintiff ha hown not only that the defendant was negligent but that there was causal connection between the negligent act and the damages whic laintiff sustained. Carreira v. Territory of Hawaii, 40 Haw. 513 18, 519; Ward v. Inter-Island Steam Navigation Co., 22 Haw. 66, 0-71. Where "there are two negligent acts by separate parties hich seemingly lead to the injury, each may be held to be a ontributing proximate cause . . . and liability may attach to oth parties . . .[but,] if the negligent act of one is later in oint of time, such act may be sufficient to interrupt the causal hain established by the other, in which case only the later act s the proximate cause and the party committing it is solely iable." Mitchell v. Branch and Hardy, 45 Haw. 128, 132; see also ax v. City and County of Honolulu, supra.

It is against this background that the district court's ligence and causation findings must be considered. We show ow (in Point II, infra) that liability should not have attached inst the United States since Mr. Furumizo's death was attributable ely to the negligence of flying instructor Shima. And, in Point , infra, we show that there is a separate, independent reason reversing the judgment against the United States in view of the t that the district court clearly erred in finding the air ffic controllers negligent in the performance of their duties.

II. THE DISTRICT COURT ERRED IN HOLDING THE UNITED STATES LIABLE FOR MR. FURUMIZO'S DEATH, SINCE THE NEGLIGENCE OF BAKER'S FLYING INSTRUCTOR SUPERSEDED ANY ALLEGED NEGLIGENCE ON THE PART OF THE CONTROLLERS AND THE INSTRUCTOR'S NEGLIGENCE WAS THE SOLE, PROXIMATE CAUSE OF THE ACCIDENT

In the instant case, the district court found that the ligence of the air traffic controllers was "a contributing se of the accident along with the negligence of defendant er in not furnishing in Shima an adequately informed and trained ot, and . . . that each is equally liable" (R. 562). We submit t, even if the Honolulu controllers were negligent in not with- ding the take-off clearance as the district court concluded, the rt below still erred in holding the United States liable for Furumizo's death. For, as we pointed out above (p.10 supra), er Hawaii law liability cannot attach against two defendants se negligent acts seemingly lead to the plaintiff's injury, n the one negligent act is later in point of time and interrupts

the causal chain established by the other. In that situation, only the later act is the proximate cause of the injury and the party committing it is solely liable. Mitchell v. Branch and Hardy, 45 Haw. 128. The record in this case reveals that the instructor pilot was clearly negligent in taking-off into the wake of the departing DC-8, despite the warning from the tower, and that this negligence superseded any alleged negligence on the controllers' part and interrupted any chain of causation established by such negligence. The accident was attributable solely to flying instructor Shima's negligent act.

A. The duties and responsibilities of Baker's instructor pilot

Essential to a determination of pilot negligence is, of course, the existence of a duty on the part of Baker's flying instructor, Mr. Charles Shima. It should be pointed out, in this regard, that the duties and responsibilities of pilots of civilian aircraft, as of June 19, 1961,are set forth in the Civil Air Regulations, 14 C.F.R. 1, et seq. (1961 Rev.). These regulations, which are promulgated by the Administrator of the Federal Aviation Agency and have the force of law (United States v. Schultetus, 277 F. 2d 322, 327 (C.A. 5), certiorari denied, 364 U.S. 828) are divided into many parts, each governing a specific phase of civil aviation. One such part, the air traffic rules (14 C.F.R. 60 (1961 Rev.)),[8/] regulates air traffic as the title

8/ Unless otherwise specified, all "14 C.F.R. 60" references may be found in the 1961 Revision of 14 C.F.R.

plies. The rules provide, inter alia: (1) that the pilot in mmand of an aircraft -- who, in the case of the Piper, was ying instructor Shima (Tr. 497, 601, 603, 657) -- is "directly sponsible for its operation and [he] shall have the final thority as to the operation of the aircraft" (14 C.F.R. 60.2);) that the pilot in command must, prior to the commencement of flight, familiarize himself with "all available information" ich is appropriate to his flight (14 C.F.R. 60.11); (3) that pilot may operate his aircraft in a "careless or reckless manner" d he must maintain vigilence to observe and avoid other aircraft 4 C.F.R. 60.12); (4) that, when on or in the vicinity of an air- rt where air traffic control is in operation, an aircraft must intain contact with the control tower either visually or by dio (14 C.F.R. 60.18(b)) and (5) that under VFR weather nditions, it is the direct responsibility of the pilot to oid other aircraft even when flying with a traffic clearance 4 C.F.R. 60.21-1, note).

The courts, in construing these Regulations, have held that VFR weather conditions the ultimate responsibility for the safe eration of an aircraft rests with the pilot of that craft. ited States v. Miller, 303 F. 2d 703, 710 (C.A. 9), certiorari nied, 371 U.S. 955; United States v. Schultetus, 277 F. 2d 322 8 (C.A. 5), certiorari denied,364 U.S. 828. The pilot has the ty of seeing and avoiding other air traffic. Franklin v. United ates, 342 F. 2d 581 (C.A. 7), certiorari denied, 382 U.S. 844;

enninger v. United States, 234 F. Supp. 499 (D. Del.), affirmed 52 F. 2d 523 (C.A. 3). Indeed, according to the court in enninger, the airplane pilot has a duty to observe and avoid the urbulence generated by other larger aircraft and his failure to o so may constitute negligence on his part. 234 F. Supp. at 517.

The evidence establishes that at the time of the accident FR weather conditions existed at the Honolulu airport (R. 377) nd the Piper had been engaged in a VFR flight (Tr. 102, 978).[9/] lying instructor Shima was thus dutybound to see and avoid other ircraft; he had the primary responsibility, as the pilot in ommand, for the safe operation of his aircraft. All the witnesse ho testified on this matter acknowledged the fact that the iper's pilot had these obligations (Tr. 601-603, 657, 1012, 1149, 236, 1369). The question becomes, therefore, whether flying nstructor Shima performed said duties with the care and iligence which a reasonably prudent instructor pilot would have xercised under similar circumstances.

B. Flying instructor Shima was negligent in failing to heed the warning given and in taking-off immediately

The uncontroverted evidence reveals that immediately after eceiving the turbulence warning and the take-off clearance, the iper aircraft began its take-off roll, climbed to an altitude of bout 50 to 75 feet, rolled to its right and crashed at a point ju

9/ To be "engaged in a VFR flight" means that the aircraft's ilot is flying his plane visually.

ort of the intersection of runways 4 left and 8 (Tr. 95, 101, , PX-5, trans. 44). The Air Force C-47, which had been cleared take-off prior to the Piper, waited an additional 20 to 40 onds before beginning its take-off roll from runway 4 right . 317-318). The C-47 made a normal take-off and, as it passed r the intersection of runways 4 right and 8, at an altitude of feet, the aircraft encountered moderate turbulence but continued its climb-out (Tr. 321). The co-pilot of the C-47, Colonel ann, testified that the C-47's pilot (Colonel Garland) delayed ing off in order "to allow the turbulence to subside" (Tr. 317). onel McCann stated that the "decision to delay for a short e" was made by the C-47's pilot after receiving the following ning and clearance from the tower -- "AIR FORCE SIX THREE THREE HT CAUTION TURBULENCE DEPARTING D C EIGHT CLEARED FOR TAKE-OFF" -5 trans. #43, Tr. 320). It was, we submit, gross negligence for ing instructor Shima to take-off immediately, despite receiving identical transmission from the tower -- "PIPER NINE NINE ZULU TION TURBULENCE DEPARTING DC EIGHT CLEARED FOR TAKE-OFF" (PX- rans. #44).

1. There can be no doubt that a reasonably prudent flying tructor would have delayed his take-off upon receiving such a ning. Mr. Joseph Jones, the chief instructor for the largest ing school in the Hawaiian Islands, testified that if he were ared for take-off and knew of the existence of turbulence in take-off area, he would not "make the take-off" (Tr. 1337-1338).

When asked by Government counsel whether he would have taken-off immediately, had he (Jones) been the pilot of the Piper on June 19 1961, knowing that which Shima knew (Tr. 1341), Mr. Jones stated that he would not have taken-off immediately as Shima had done (Tr. 1343). Moreover, Jones stated, if he had taken-off immediate after being cleared, he would have kept the Piper "on the ground until it was past runway 8, where the heavy aircraft had taken-off [from]" (Tr. 1343).

Mr. George Carter, who was general manager of Shima's employer at the time of the accident and a licensed pilot, testified that if he were in a light airplane on runway 4 left and a large aircraft had just taken-off from runway 8, he would not take-off immediately but would "hold" his aircraft (Tr. 1445). It is noteworthy that the situation posed to Carter did not include a turbul warning (Tr. 1445). Mr. Carter also stated that he has delayed taking-off in an aircraft "many times" after being cleared to perform this maneuver, because of turbulence generated by another aircraft (Tr. 862-863). He did not indicate whether, in those instances, he had received a warning of turbulence from the tower (Tr. 862-863).

Mr. Carter further testified that pilots are not required to off upon receiving a take-off clearance; they may refuse the clearance (Tr. 862). Mr. E. J. Kay, the chief flying instructor Shima's employer, agreed (Tr. 588-589). He testified that the pilot in command of the aircraft is responsible for the acceptanc

a clearance (Tr. 601-602). Should the pilot feel that the euver for which he has been cleared might be unsafe, he can use the clearance and "ask for a delay . . . of a specified unt of time (Tr. 588-589).[10/]

2. Certainly, the pilot in command of the Piper could not have ieved that the transmission from the tower, clearing his air-ft for take-off, was a command to take-off immediately, especially ce the transmission included a warning of a potentially unsafe dition created by the preceding aircraft (PX-5 trans. # 44).

The Piper's pilot was not the ordinary run-of-the-mill ensed private pilot who might have viewed a clearance as a mand (See page 24 , n.12 infra). Mr. Shima was a professional ot, one who earned his living both as a charter pilot, flying planes inter-island for the Andrew Flying Service, and as an tructor pilot, teaching students who attended defendant-Baker's ght school (Tr. 592, 794). As a licensed pilot, he would have n familiar with the Civil Air Regulations, including Section 60.60 reof, which points out that clearances are not mandatory in ure (See p. 25 , infra). He would also have been familiar with Flight Information Manual which plainly states that a "clearance . is permissive in nature" (GX-6, p. 82). (See p. 25 infra).

[10/] It is significant, we believe, that air traffic controllers ect pilots to refuse take-off clearances occasionally and, in ition, to make the final decision as to when, and from where, to e-off (Tr. 269, 998, 1237, 1332, 1369, 1429).

According to Baker's general manager, that Manual was readily available to Mr. Shima and the other instructor pilots employed by the flying school (Tr. 879). Finally, as a flying instructor, Mr. Shima would have had to instruct his students on the matter of the non-mandatory nature of air traffic clearances (Tr. 832). Thus, the Piper's pilot must have been aware, when he received the warning and clearance from the tower, that he was not required to take-off immediately. Had the tower controller wanted him to take-off without delay, he would have issued the following transmission: "CLEARED FOR IMMEDIATE TAKE-OFF" (GX-5, §439.11).

3. That Mr. Shima knew or should have known of the danger of flying into the turbulent wake of the DC-8 is clear from the recor His employer's chief flying instructor,Mr. Kay, specifically testified that he had "trained Mr. Shima" (Tr. 592) and that Shima was aware of the dangers of wake turbulence (Tr. 626). There is no evidence in the record controverting Mr. Kay's testimony.

Furthermore, even if Shima was unaware of the problem, the overwhelming evidence is to the effect that he should have known of the danger of wake turbulence. For, it was stipulated, that, a of the date of the accident, "[t]he existence of the potential hazards of turbulent wake of large aircraft to smaller aircraft wa a matter of 'common knowledge' in the flying industry . . ." (R. Indeed, Shima must have been examined on the subject of wake turbulence prior to receiving his pilot's license and also during

course of the oral examination given by the FAA to those
ots desiring to be flying instructors (Tr. 601).
Aside from the numerous publications which were issued
or to the accident warning pilots not to fly into the wakes
large aircraft (See GX-2, GX-3, GX-11, PX-15, PX-36), the
ots' handbook (the Flight Information Manual, GX-6), which was
llable to Shima (Tr. 879), informed pilots of the hazards
wake turbulence and advised them to be "on the alert" for
bulence "when taking-off and landing behind large aircraft"
1250-1251). Moreover, since it was a universal practice
ng flying schools to instruct students on the dangers of
turbulence (Tr. 1331) and, inasmuch as Baker's students
eived instruction on this subject (Tr. 572), Mr. Shima must
been familiar with the wake turbulence problem, being a
ing instructor employed by Baker. Certainly, if there had
any doubt in his mind as to turbulence danger the specific
tionary warning from the tower fully alerted him to that danger.
4. In sum, the Piper's pilot was warned of the existence
the turbulence generated by the DC-8. Furthermore, he knew
should have known of the danger involved in flying into
turbulence in his Piper aircraft. Yet, he decided to
ore the warning and take-off immediately instead of pursuing
of the other courses of action available to him. In so doing,
na plainly failed to exercise that degree of care which a
sonably prudent instructor pilot would have done under similar

circumstances. The district court plainly erred, therefore, in not finding this failure on Shima's part to be negligent.

C. Shima's negligence was the sole, proximate cause of Furumizo's death

We demonstrated above (pp.14-20 supra) that the flying instructor was negligent in taking-off immediately despite the warning issued by the tower. Unquestionably, his negligent act was later in point of time than the conduct of the tower controllers which the district court found to be negligent (R. 562). The question still remains, however, as to whether the flying instructor's action breaks any chain of causation established by the controllers' alleged negligence (See page supra). According to the Hawaii Supreme Court, this turns on whether the later act of negligence, i.e., Shima's taking-off immediately, was reasonably forseeable or not. If it was not, then the reviewing court may hold, as a matter of law, that the chain of causation established by earlier negligent act was broke by the later one. Mitchell v. Branch and Hardy, 45 Haw. 128.

The Honolulu controllers had no reason to believe that Mr. Shima would ignore the warning given him and take-off immediately Indeed, they had every reason to believe that Shima would heed th warning and wait until the turbulence from the DC-8 had subsided, as the C-47's pilot had done, until beginning the take-off roll. In this regard, chief controller Garcia testified that, on many occasions prior to the accident, he had issued absolute clearance

ht aircraft, waiting to take-off from runways 4 left and 4
ht, when heavy aircraft were taking-off from runway 8, and
t the light aircraft delayed their taking-off therefrom or
ir pilots refused the clearance given (Tr. 1041). The only
er Honolulu tower controller who testified at the trial
. Capellas) stated that prior to the accident pilots had
asionally refused clearances issued by him (Tr. 148). Both
trollers understood clearances to be merely permissive in
ure and they assumed that pilots were aware of this fact
. 237, 269, 998, 1012). Had they wanted Shima to take-off
ediately, they would have, in accordance with the controller's
ual (GX-5, §439.12), issued a clearance to that effect.
Clearly, Shima's reckless action could not have been foreseen.
s, even if the controllers were negligent, in issuing the critical
nsmission when they did, any chain of causation established
their action was broken by Shima's intervening act. His decision
take-off into the wake of the DC-8, in spite of the warning
ued by the tower, was the sole, proximate cause of Mr. Furumizo's
th. Mitchell v. Branch and Hardy, supra.

III. THE DISTRICT COURT ALSO ERRED IN FINDING THAT THE HONOLULU TOWER CONTROLLERS WERE NEGLIGENT IN THE PERFORMANCE OF THEIR DUTIES AT THE HONOLULU AIRPORT AT THE TIME OF THE ACCIDENT INVOLVED HEREIN

The district court also found that the Honolulu controllers
uld have "attempted to exercise their reasonable judgment and
empted to hold up the clearance a sufficient time to minimize

the acute danger" to the Piper which existed by virtue of the turbulence generated by the DC-8 and that "this failure to exercise any judgment under the circumstances constituted negligence on . . .[their] part" (R. 562). We submit, and now show, that the lower court erred in so finding and that, as a result, there is a separate, independent basis for reversing the judgment entered against the United States.

A. The transmission to Piper was a conditional, not absolute, clearance for take-off

The district court, in finding the Honolulu controller negligent, stated that the tower operators should have exercised "their reasonable judgment" and "[held] up the clearance" to the Piper until the turbulence danger had passed (R. 562). But this finding was based on the notion that, when the local controller said to the Piper's pilot "PIPER NINE NINE ZULU CAUTION TURBULENCE DEPARTING DC-EIGHT CLEARED FOR TAKE-OFF" (PX-5 trans. # 44), this transmission meant that the Piper aircraft was authorized, from that moment on, to initiate its take-off roll. There is, however, absolutely no support for that notion. Indeed, it is squarely refuted by the actual text of the transmission message.

Had the Honolulu controller merely told the Piper's pilot that his aircraft were "cleared for take-off," the Piper would, unquestionably, have had authority to begin its take-off roll any time thereafter (See n. 12 , p. 24-25 , infra). But, in the instant case, the controller did not issue such an absolute

arance to the Piper's pilot. Rather, the clearance issued to Piper aircraft was a qualified one, that is, the Piper was horized take-off only after its pilot determined that the bulence created by the DC-8 had subsided. In other words, the er had issued a conditional clearance to the Piper; the clearance not become effective until the Piper's pilot was convinced t the turbulence danger had passed. Thus, contrary to the rt's finding, the Honolulu controllers had, in fact, "held up" issuance of the clearance to the Piper. Its negligence finding not, therefore, stand.

B. No duty on controllers to delay issuance of take-off clearance because of turbulence danger

Even if the transmission discussed above were deemed not to a conditional clearance to take-off, the lower court's ligence finding must still be overturned. For, that finding grounded on the premise that control tower operators have uty to lengthen the separation between departing aircraft, by nholding the second craft's take-off clearance, when there is anger that it will encounter wake turbulence. There is no is, we submit, for the court's imposition of such an obligation controllers.[11/]

11/ Section 26.26 of the Civil Air Regulations provides that tower rators "shall control [air] traffic in accordance with the cedures and practices . . . prescribed in the appropriate air ffic manuals of the Federal Aviation Agency . . ." 14 C.F.R. 26.26 61 Rev.). These manuals have been described by this Court as "bible for tower operators." United States v. Miller, 303 F. 2d , 710, n. 16, certiorari denied, 371 U.S. 955. The manual used ntinued)

1. It is apparent from a reading of the district court's opinion that the lower court imposed on controllers a duty to delay issuing clearances in wake turbulence situations because it believed, "a pilot or pilots in a small plane like the Piper . might interpret the clearance as . . .[a] command for immediate take-off" and, in complying with the "command", expose himself or themselves to an "enormous hazard" (R. 598).[12/] And, according to the court below, the tower personnel "should have . . . anticipated" that such pilots might have viewed a clearance in this light (R. 598). The district court clearly erred in this regard since controllers had every reason to believe, as of the date of this accident, that licensed pilots -- and certainly flying instructors -- understood that air traffic clearances were permissive in nature.

It is undisputed that, in order to be licensed as a private

11/ Continued
by tower personnel, as of the date of the accident, is commonly referred to as the ATM-2-A Manual (Tr. 268). That manual (GX-5) sets forth the various duties and responsibilities of air traffic controllers as of June 19, 1961. See Hartz v. United States, 249 F. Supp. 119, 123 (N.D. Ga.) (a notice of appeal has been fil in that case).

The Manual contains no provision to the effect that controlle must lengthen the separation between departing aircraft in wake turbulence situations (GX-5). Rather, it provides that "when controllers foresee the possibility that departing aircraft might encounter -- thrust stream turbulence or wing tip vortices from preceding aircraft" they should issue "cautionary information to this effect . . . to the pilots concerned" (GX-5 §411.7). The incident involved in this case clearly comes within this proviso. (See pages 32-33, infra).

12/ The court below did recognize, however, that an air traffic clearance is "a mere authorization and not a command" (Tr. 597).

(Continued)

ot by the FAA, one had to pass an examination on the Civil Regulations and, in particular, on Part 60 thereof (Tr. 860). is also undisputed that FAA approved flying schools, like that rated by defendant-Baker, are required to instruct their dents on the Civil Air Regulations (Tr. 853). Among the ulations which licensed pilots should have been familiar h therefore, is Section 60.60 which states that an air traffic arance is an "[a]uthorization by air traffic control . . . for aircraft to proceed under specified traffic conditions . . ." C.F.R. 60.60 (1961 Rev.). In addition, the Flight Information ual states that "a clearance issued by a tower (such as 'cleared land') either by radio or visual signal is permissive in nature does not relieve the pilot from exercising a reasonable degree caution . . ." (GX-6, p. 82). Since this manual was considered be the pilot's "handbook" (Tr. 271), licensed pilots should e known that clearances issued by tower personnel were not the nature of a command to execute some maneuver.

Significantly, the controllers who testified in the court ow were of the belief that, after issuing a take-off clearance an aircraft, it was then up to the pilot to decide what action take (Tr. 998, 1012, 1149). They believed that the pilot could

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re can be no doubt that a clearance to take-off is permissive nature; a pilot is not required to take-off immediately upon eiving the communication. See New York Airways, Inc. v. United tes, 283 F. 2d 496 (C.A. 2); Khourey v. American Airlines, Inc., Ohio St. 310, 164 N.E. 2d 402; see also United States v. Miller, ra, at p. 710.

refuse a clearance (Tr. 148, 1041, 1321), that he had authority to request a change in the clearance (Tr. 269, 1250) and that, once cleared for take-off from a particular point on a runway, he was free to taxi back and use the entire runway for his take-off (Tr. 237, 249, 1038). Their views on this matter were shared by the several pilots who testified in the lower court (Baker's chief flying instructor, Tr. 588, 593, 599, 641-642, 667; Baker's general manager, Tr. 832, 840, 841, 862; and flying instructor Jones, Tr. 1332, 1338).[13/]

There is, therefore, no basis for the court's finding (R. 598) that the Honolulu tower personnel "should have . . . anticipated that a pilot or pilots in a small plane like the Piper . . . might interpret the clearances as [a] . . . command for immediate take-off . . ." Indeed, the evidence discussed above compels a holding to the contrary, especially in view of th fact that the clearance was coupled with a warning of the existen of wake turbulence in the take-off area.[14/] Since the lower court

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13/ The pilots' Flight Information Manual instructs pilots "to bear in mind that they have the authority to ask for a change in clearance" (GX-6, p. 82). Mr. Carmody, the air traffic control specialist, testified, in this connection, that he never encounte a pilot who didn't know that he had the right to request a change in a clearance (Tr. 1250).

14/ In determining that many pilots do not understand the nature a clearance, the lower court relied, apparently, on certain state ments made by Baker's general manager, Mr. George Carter and plai exhibit 19 (R. 590-591). To be sure, Mr. Carter had testified th in his opinion, many pilots were under the impression that a clearance was in the nature of a command (Tr. 832). But, in ligh of the evidence discussed above (pp. 24-26 , supra), we submit th it was unreasonable for the court to infer from this statement th the tower operators should have anticipated that the Piper's pilo

(Continued)

position of a duty to delay was based, in part, on the court's roneous belief regarding air traffic clearances, its duty lding cannot be sustained.

2. In concluding that controllers must do more than issue warning in wake turbulence situations, but must make certain at no aircraft takes-off until the wake turbulence danger has ssed, the district court has, in effect, shifted the ultimate sponsibility for the safe operation of aircraft from the censed pilot to the FAA tower personnel. The courts, however, ve consistently held that the direct and primary responsibility r the safe operation of an aircraft rests, not with the ntrollers, but with the aircraft pilot. United States v. Miller, 3 F. 2d 703, 710 (C.A. 9), certiorari denied, 371 U.S. 955; ited States v. Schultetus, 277 F. 2d 322, 326 (C.A. 5), certiorari nied, 364 U.S. 828; Wenninger v. United States, 234 F. Supp. 499, 6-517 (D. Del.), aff'd., 352 F. 2d 523 (C.A. 3); Smerdon v. United ates, 135 F. Supp. 929, 931-932 (D. Mass.).

In United States v. Miller, supra, this Court reversed the cision of the lower court, which had held the United States

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7 Continued
any other pilot might construe the clearance issued as a mmand. With respect to plaintiff's exhibit 19 (CAR Draft Release 0-1), we note that that document was merely a notice of proposed le-making and that the rules proposed therein were never omulgated by the agency (Tr.1198-1199). In any event, it does t support the court's finding that many pilots viewed a earance as a command or an order to execute some maneuvers (PX-19).

liable for the negligence of its control tower personnel in failing to prevent the mid-air collision between a Beechcraft and a Cessna within an FAA controlled zone. The Court, in holding the Beechcraft's pilot negligent, stated, that "the focal point o ultimate responsibility for the safe operation of an aircraft under VFR weather conditions rests with the pilot. Under such conditions, he is obligated to observe and avoid other traffic even if he is flying with a traffic clearance." 303 F. 2d at 710.[15/] The tower controller, on the other hand, "is merely [required] to assist the pilot in the performance of his duties, not to relieve him of those duties." 303 F. 2d at 711.

Similarly, in Schultetus, the Fifth Circuit held, with respec to the district court's finding that certain controllers were negligent in failing to instruct a pilot to alter his course so as to avoid colliding with another aircraft, that:

> The theory followed by the district court would place upo the operators of control towers the primary responsibility for the operation of aircraft at the field. Governmental regulations, having the force of law, have assigned this responsibility to the operators of aircraft.

In addition, the court of appeals stated that the lower court err in finding that the tower operators negligently failed to maintai proper spacing between two aircraft within the control zone. The

15/ The weather at the time of the accident involved herein was such that visual flight rules were in effect (R. 377).

ifth Circuit noted (277 F. 2d at 327):

> Here again the district court has overlooked the principle that the direct and primary responsibility for the operation of aircraft over or in the vicinity of an airport rests upon the pilots of the aircraft. We are of the belief that in this respect also the district court was in error.

And in Wenninger v. United States, supra, in which plaintiffs' ecedent was killed when his aircraft crashed allegedly as a esult of encountering wake turbulence generated by an Air orce C-124, the trial court ruled that decedent's failure to bserve and avoid the C-124's turbulence constituted negligence n his part. The court, citing this Court's decision in Miller, cated that "[u]nder VFR weather conditions, the ultimate esponsibility for the safe operation of an aircraft rests with he pilot. He is under a duty to see and avoid other traffic ven if flying with a traffic clearance." 234 F. Supp. at 516-517.

Recently, the District Court for the Northern District of eorgia had occasion to pass on the very question involved in this ase. Hartz v. United States, 249 F. Supp. 119. There, as here, he plaintiffs had contended that the tower operator "should have elayed the take-off clearance [issued to the Beech Bonanza] o as to permit the vortex turbulence [created by the departing DC-7 o dissipate." 249 F. Supp. at 125. The court, relying on the ases discussed above, refused to impose such a duty on the ir traffic controllers, reasoning that (Ibid.):

> [T]he ultimate responsibility for the take-off at that or any other time rests with the pilot; the pilot, not the controller, was in position to delay his take-off if he felt it to be his benefit to do so.

For the same reasons, we believe, it was clear error for the court below to impose a duty to delay on the Honolulu controller.[16]

Were the lower court's duty finding to stand, this would, in effect, make the Government an insurer of flight safety. To be sure, the controller is required to perform his duties fully and properly, but this does not require him to warn one aircraft of the presence of another craft in the control zone when no danger of collision between the two existed (Franklin v. United States, et al., supra), nor warn an aircraft of danger from helicopter wake turbulence when the helicopter turbulence problem was then unknown to the aviation industry (Franklin v. United States, supr nor give a general warning signal to the pilot of one aircraft concerning the presence of another in the control zone when the latter knew of the presence of the former (United States v. Schul supra), nor determine whether a particular weather condition is safe enough for an aircraft to land when the pilot of the craft h been fully advised thereof (Smerdon v. United States, 135 F. Supp

16/ It must be remembered that "an air traffic controller is not supposed to give his attention to any one aircraft in the control zone if other aircraft are present. All aircraft within the control zone should have the controller's attention." Franklin v United States, 342 F. 2d 581 (C.A. 7), certiorari denied, 382 U.S 844; see also New York Airways, Inc. v. United States, 283 F. 2d 496, 498.

, 923 (D. Mass.)), nor observe a small aircraft enter the trol zone on a hazy day when the aircraft had made no radio tact with the tower (Stanley v. United States, 239 F. Supp. (N.D. Ohio).[17] By the same token, we do not believe that an traffic controller is required, after warning a pilot of the bulence danger, to delay clearing the pilot's aircraft for e-off until that danger has passed. It is the pilot's ponsibility alone to decide when to initiate the take-off.

C. No breach of any duty owed by the government controllers

The evidence before this Court clearly establishes that control tower operators performed all the duties required them under the circumstances and that they performed m in a reasonable and proper manner. The record reveals t as the Piper was in the process of executing a touch-and-go ding on runway 4 left, it was instructed by local control rator Humphreys[18] to make " . . .A FULL STOP [AND] TO HOLD RT OF [RUNWAY] EIGHT IF POSSIBLE" (PX-5 trans. # 19, Tr. 964).

The court below appears to rely (R. 573) on Johnson v. United tes, 183 F. Supp. 489 (E.D. Mich.) which involved the crash of ight aircraft that had been cleared to land at a FAA controlled port at which a B-47 jet bomber had been making practice approaches court held that the proximate cause of the crash was the lure of the light aircraft's pilot to execute the proper traffic tern. The court indicated that the tower operator should have en into consideration the effect of the turbulence created by B-47 in issuing the clearance to land. Since the court denied intiffs any recovery because of the negligence of the light craft's pilot, the court's duty statement is plainly dictum.

Mr. Humphreys did not testify at the trial, having died prior reto (Tr. 926-927). He received his instructions from chief troller Garcia (Tr. 231, 984).

The Piper was so instructed because an Air Force T-33 and a Japan Airlines DC-8 were about to depart from the airport on runway 8 (Tr. 92, 964). The Piper acknowledged the transmission and stopped on runway 4 left, near the midfield taxi strip, some 900 feet south of the intersection of runways 4 left and 8 (Tr. 8 229, PX-1).

After issuing instructions and information to other aircraft in the control zone the tower cleared the T-33 for immediate take off and shortly thereafter cleared the Japan Airlines DC-8 for take-off (Tr. 966-969, PX-5). Nine transmissions later, the local control operator cleared a Cessna 150, located on runway 4 left just north of the intersection of runways 4 left and 8, fo take-off from 4 left (Tr. 973-974). Then, the controller advised the C-47, located at the end of runway 4 right: "AIR FORCE SIX T THREE EIGHT CAUTION TURBULENCE DEPARTING DC EIGHT CLEARED FOR TAK OFF" (PX-5 trans. # 43, Tr. 974). Thereafter, defendant-Baker's aircraft received the following transmission from the tower: "PIPER NINE NINE ZULU CAUTION TURBULENCE DEPARTING DC-EIGHT CLEAR FOR TAKE-OFF" (Tr. 974, PX-5). At the moment the warning and clearance were given to the Piper, the DC-8 was airborne just bey the end of runway 8 (Tr. 984, 1077).[19/] Upon receiving the transmi

19/ Apparently, Mr. Humphreys had issued the warning and clearanc to the Air Force C-47 just after the airborne DC-8 had passed the intersection of runway 4 right (Tr. 1076).

m the tower, the Piper -- unlike the C-47 (Tr. 317-318) --
ediately began its take-off roll (Tr. 234, 1077). At this
ent, the DC-8 was south of Sand Island, on a heading of 150
rees, approximately 2 miles beyond the intersection of
ways 8 and 4 left (Tr. 1069, 1077, PX-1).

Thus, the separation between the Piper and the DC-8, at the
e the Piper received the clearance, was greater than the minima
scribed in the air traffic controller's Manual (Section 422.2,
5) for two departing aircraft.[20] And, at the time the Piper began
take-off roll, the distance between the two aircraft was
stantially greater (PX-1). Moreover, the chief controller
fully complied with Section 411.7 of the Manual (GX-5) when,
n foreseeing the possibility of the Piper encountering the
bulence created by the DC-8, he instructed the local control
rator to issue cautionary information regarding such turbulence
the Piper (Tr. 995). In accordance with the phraseology
ommended in the controller's Manual (Section 439.1Q), the
al controller issued the turbulence warning and then, since no
lision hazard existed, cleared the aircraft for take-off
ject to that warning (Tr. 974).[21]

The district court stated, in its opinion, that it agreed
th the contention of the plaintiffs and defendant Baker that,
the time of the accident, neither the applicable laws and rules
any regulations or directives of the aviation authorities of
government prescribed any separation standards for runways that
ersect" (R. 592). The court's determination is contrary not
y to the uncontroverted testimony of the air traffic control
ert, but also to the testimony of controllers Cappellas and Garcia
. 243, 1166-1167).

On pages 24-26 supra, we showed that a clearance is not a command
do something, but rather an authorization to do it.

Certainly, it cannot be said that the Honolulu tower controllers breached any duty owed to Messrs. Shima or Furumizo. The fact that the pilot in command of the Piper "elected" to take off immediately (Tr. 234) does not, in any way, establish negligence in the conduct of any of the government controllers.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment entered against the United States should be reversed.

Respectfully submitted,

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June 1966.

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the fo going brief is in full compliance with those rules.

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APPENDIX

1. The Federal Tort Claims Act, 62 Stat. 933, 982, as ded, 28 U.S.C. 1346(b), 2671, et seq., provides in pertinent :

28 U.S.C. 1346(b):

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. The Civil Air Regulations (14 C.F.R. 1, et seq. 1 Rev.)) provide in pertinent part:

§60.1 Scope. The air traffic rules in this part shall apply to aircraft operated anywhere in the United States, including the several States, the District of Columbia, and the several Territories and possessions of the United States, including the territorial waters and the overlying airspace thereof,

* * * * *

§60.2 Authority of the pilot. The pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to operation of the aircraft.

* * * * *

§60.10 Application.

Aircraft shall be operated at all times in compliance with the following general flight rules and also in compliance with either the visual flight rules or the instrument

flight rules, whichever are applicable.

§60.11 Preflight action.

Before beginning a flight, the pilot in command of the aircraft shall familiarize himself with all available information appropriate to the intended operation. Preflight action for flights away from the vicinity of an airport, and for all IFR flights, shall include a careful study of available current weather reports and forecasts, taking into consideration fuel requirements, an alternate course of action if the flight cannot be completed as planned, and also any known traffic delays of which he has been advised by air traffic control.

§60.12 Careless or reckless operation.

No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others.

§60.21-1 Air traffic clearance [3/] (FAA policies which apply to §60.21).

(a) When an air traffic clearance has been obtained unde either VFR or IFR rules, the pilot in command may not deviate from the provisions thereof unless an amended clearance is obtained or an emergency exists. Pilots desiring to make a change in altitude, route, or destination should request the change from an appropriate communications facility and receive Air Traffic Control approval prior to making the change.

3/ An air traffic clearance is an authorization by Air Traffic Control for an aircraft to proceed under specified traffic conditions within a control zone or control area. is issued for the purpose of preventing collision between aircraft known to Air Traffic Control and does not constitu authority to violate any provision of the CAR. * * * *.

An air traffic clearance provides separation from other aircraft only during that portion of a flight conducted in weather conditions less than VFR minimums. It is the direct responsibility of the pilots to avoid other aircraft when flying in VFR conditions even with a traffic clearance. * * * *.

§60.60 Definitions.

As used in this part, terms shall be defined as follows:

* * * * *

Air traffic. Aircraft in operation anywhere in the airspace and on that area of an airport normally used for the movement of aircraft.

Air traffic clearance. Authorization by air traffic control, for the purpose of preventing collision between known aircraft, for an aircraft to proceed under specified traffic conditions within controlled space.

Air traffic control. A service operated by appropriate authority to promote the safe, orderly, and expeditious flow of air traffic.

* * * * *

VFR. The symbol used to designate visual flight rules.

VFR conditions. Weather conditions equal to or above the minimum prescribed for flights under VFR.